

**Judgment of United States Court of Appeals  
for District of Columbia Circuit**

**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 81-2298—September Term, 1981

Civil Action No. 76-00403

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EUGENE R. EHMANN,

*Appellant,*

—v.—

CLARENCE M. KELLEY,

Director of the Federal Bureau of Investigation, et al.

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF COLUMBIA

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**B e f o r e:**

ROBINSON, *Chief Judge*, and  
WALD and GINSBURG, *Circuit Judges*.

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**JUDGMENT**

This case was heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel. The court has accorded full consideration to the issues presented; they occasion no need for an opinion. *See* D.C. Cir. Rule 13(c).

For the reasons stated in the accompanying memorandum it is ORDERED and ADJUDGED that the judgment from which plaintiff-appellant Ehmann appeals is affirmed.

Per Curiam  
For the Court

S/ GEORGE A. FISHER  
George A. Fisher  
*Clerk*

United States Court of Appeals  
for the District of Columbia Circuit  
FILED September 2, 1982  
GEORGE A. FISHER, *Clerk*

**Opinion of United States Court of Appeals  
for District of Columbia Circuit**

*Memorandum*

Assuming *arguendo* that plaintiff-appellant Ehmann had a protected property interest in his employment as a special agent, the opportunity defendants-appellees accorded him to present his position comported with the requirements of due process, and his discharge for serious misconduct was within the authority of the Director of the Federal Bureau of Investigation. See *Wehner v. Levi*, 562 F.2d 1276 (D.C. Cir. 1977).

**Judgment of United States District  
for District of Columbia**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

**C.A. No. 76-0403**

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**EUGENE R. EHMANN,**

*Plaintiff,*

—v.—

**CLARENCE M. KELLEY, et al.,**

*Defendants.*

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**JUDGMENT**

For the reasons stated in the Memorandum of November 6, 1981, it is hereby

ORDERED that defendants' Clarence M. Kelley and Edward H. Levi motion for summary judgment in C.A. 76-0403 is granted; and plaintiff Eugene R. Ehmann's motion for summary judgment is denied.

S/ **WILLIAM B. BRYANT**  
**William B. Bryant**  
*United States District Judge*

Date: November 6, 1981

**FILED**  
Nov 9 1981  
**JAMES F. DAVEY, Clerk**

**Memorandum & Order of United States  
District for District of Columbia**

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

C.A. No. 76-0403

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EUGENE R. EHMANN,

*Plaintiff,*

—v.—

CLARENCE M. KELLEY, et al.,

*Defendants.*

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**MEMORANDUM AND ORDER**

Plaintiff was a Special Agent assigned to the Tucson, Arizona office of the F.B.I. He worked regular daytime hours. Around the middle of June 1975 plaintiff's unavailability during morning hours aroused the suspicions of a supervisor, and subsequent investigation revealed that plaintiff had enrolled for daytime classes scheduled to begin on June 9, 1975 at the University of Arizona, and actually attended these classes on June 9, 13, 16, 19, 20, 23 and 24 for a total time of about twenty hours. He withdrew from the courses on the same day he was directed to report to his superiors in Phoenix. According to plaintiff this withdrawal preceded his awareness of the directive to report. Plaintiff claims that he checked with his office for messages during and between classes, and that he kept up with his case load by working overtime. However, plaintiff concedes that he falsified his expected whereabouts when he left for the school on the days in question, and that though he used an official government automobile to drive to and from the classes he was out of radio contact with his office and that his superiors were unaware of this whereabouts during his attendance of the classes.

During a conference with his supervisor, plaintiff acknowledged awareness of violations of F.B.I. regulations, and that he took a chance that his derelictions would not be detected, and submitted a three-page handwritten statement to this effect. By way of mitigation, plaintiff indicated that a recent cancer operation had probably upset him and clouded his judgment in the matter.

The Special Agent-in-Charge, recognizing the "gravity of this situation", recommended that plaintiff be censured, placed on probation, transferred out of the Phoenix Division, and suspended from duty for 30 days.

The Administrative Division of the F.B.I. rejected the SAC's recommendation, and indicated that inasmuch as plaintiff's conduct was a clear and flagrant violation not only of Bureau regulations, but of the trust placed in a Special Agent, he should be allowed to resign or be dismissed.

In his notice of separation from the Bureau plaintiff was advised of his right of appeal to the Director of the F.B.I.

In a letter to the Director, plaintiff's counsel indicated that he desired to avail himself of this right, and therein he requested "an opportunity to appear before you to personally present the matter for your attention and review".

In his reply to this letter the Director stated: "Prior to any consideration being given in this regard, it is requested that Mr. Ehmann, through you, submit to me in writing the facts on which he proposes to base his appeal."

Plaintiff's response alleged that his sole dereliction was a commonplace one among agents, *i.e.*, failure to submit in advance a request for supervisory approval that the time he was to spend out of service and on personal business be counted against accumulated leave. According to plaintiff, such misconduct does not usually result in dismissal, and the penalty imposed in his case was arbitrary and excessive.

The Director sent a letter to plaintiff's attorney denying plaintiff's request for a hearing on the grounds that no new

information had been presented to mitigate plaintiff's actions. In the same letter, the Director also denied the appeal of plaintiff's dismissal.

Plaintiff alleges that his dismissal constituted a deprivation of property and liberty without due process of law; that the F.B.I.'s dismissal of plaintiff was an arbitrary and capricious penalty; and that since similarly situated employees have not, in the past, been similarly disciplined, plaintiff's dismissal also constitutes a deprivation of his right to equal protection of the law. The defendants and the plaintiff have filed cross-motions for summary judgment. Judgment in this action was stayed pending decision by the Court of Appeals of the related cases of *Wehner v. Levi*, 562 F.2d 1276 (D.C. Cir. 1977) and *Ashton v. Civiletti*, 613 F.2d 923 (D.C. Cir. 1979).

## I. PROPERTY INTEREST

The government may not deprive an individual of a "liberty" or "property" interest without due process. *Mathews v. Eldridge*, 424 U.S. 319 (1975). Once it is determined that due process applies, the question remains what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971).

A property interest in employment may be secured by statute, rules or "mutually explicit understandings." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The F.B.I. is excepted from Civil Service regulations relating to selection and tenure. 28 U.S.C. § 536. But the F.B.I.'s communications to its employees—specifically, its letter of appointment, its Handbook and its Manual of Instructions—give rise to an implied promise of continued employment contingent only on satisfactory work. *Ashton*, 613 F.2d at 930. Plaintiff, a Special Agent of the F.B.I., received these communications at the start of his employment. Plaintiff, therefore, had a property interest in his job entitling him to due process protections in the event of dismissal.

The procedures which accord due process in a specific case depend on three distinct factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge*, 424 U.S. 319, 335 (1975).]

Plaintiff's interests in continued employment with the F.B.I. are the maintenance of his income and the preservation of his professional reputation. The governmental interest involved in the case at hand is the protection of high standards of integrity among F.B.I. personnel. As is usually the case, plaintiff contends that his interests entitled him to a formal hearing prior to dismissal, while the government contends that requiring such a hearing would impair the F.B.I.'s ability effectively to carry out its law-enforcement mission.

In this case, however, the procedures accorded plaintiff in fact reduced to a minimum the risk that plaintiff would be erroneously deprived of his interest in continued employment. At the June 24, 1975 interview with Special Agent Long, plaintiff was advised of his superiors' suspicions that he was attending school on F.B.I. time. Plaintiff admitted orally and subsequently in writing that he had impermissibly attended twenty hours of class on government time; he also described in detail the circumstances he believed mitigated his actions. Following plaintiff's July 3, 1975 dismissal from the F.B.I., plaintiff was given an opportunity to submit additional information in an appeal of his dismissal to the Director. Plaintiff did so in a letter written by his attorney on September 19, 1975.

Plaintiff's voluntary admission to the charges against him sharply diminishes the value that additional procedures, such as an evidentiary hearing, would have had in his case. Moreover, the circumstances which plaintiff contends mitigate his



violations were not so "complex or difficult to develop or present" as to warrant a formal hearing. *See Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1972). Plaintiff's opportunity to explain his actions in his June 24 interview and sworn statement and his opportunity to appeal his dismissal to the highest level of the FBI adequately safeguarded plaintiff's due process rights.

## II. LIBERTY INTEREST

Where a person's "good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1971). The purpose of a *Roth* hearing is to give the person an opportunity to refute the charges and clear his name. *Id.* at 573. But where there is no factual dispute with a significant bearing on the employer's reputation, a hearing serves no useful purpose and is not constitutionally required. *Codd v. Velger*, 429 U.S. 624 (1976); *Wehner v. Levi*. Since no factual dispute underlies plaintiff's dismissal, an oral hearing to ensure the protection of plaintiff's reputation interest is unnecessary.

## III. THE PROPRIETY OF THE PENALTY

Plaintiff contends that even if the procedures followed in his case were adequate to afford him due process, the end result of those procedures—the penalty of dismissal—is so harsh and arbitrary that it constitutes an abuse of discretion. Although Special Agent Long recommended that plaintiff be censured for his violation, Assistant Director E.W. Walsh decided to dismiss plaintiff, and Director Kelley upheld the Assistant Director's determination on appeal. The Director's decision to dismiss plaintiff is based upon his review of plaintiff's record, which provided substantial evidence of plaintiff's violations of F.B.I. rules and plaintiff's attempts to conceal these violations. While the Director could have imposed a lighter penalty, his exercise of his discretionary authority to dismiss plaintiff was

not so arbitrary as to violate due process. *See Arnett v. Kennedy*, 416 U.S. 134, 183 (1973). *Cf. Boyce v. United States*, 543 F.2d 1290 (Ct. Cl. 1976) (dismissal of Internal Revenue Service employees for failure to file timely federal tax returns was abuse of discretion where plaintiffs had many years of satisfactory service and where there was no showing that failure to file was intentional).

Plaintiff also contends that the Director violated plaintiff's equal protection rights, because other agents who have committed violations similar to his have not been punished with dismissal. The government's selective enforcement of its laws and regulations does not amount to a denial of equal protection unless the government acts in bad faith, or intentionally discriminates on the basis of race, sex, national origin, or other arbitrary classification. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Oyler v. Boles*, 368 U.S. 448 (1962); *Woodbury v. McKennon*, 447 F.2d 839 (5th Cir. 1971). Plaintiff has made no showing that his dismissal by the government was improperly motivated.

Defendants' motion for summary judgment is granted.

Plaintiff's motion for summary judgment is denied.

S/ WILLIAM B. BRYANT  
*United States District Judge*

Date: November 6, 1981

FILED  
Nov 9 1981  
JAMES F. DAVEY, *Clerk*